WONG FOO LEONG

v.

LEW SIEW FONG & ANOR.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 275 of 1979]
25 JUNE 1985

TORT: *Plaintiff injured while welding 2nd defendant's tanker - Negligence - Question of liability of owner - Breach of common law duty - Res ipsa loquitur.*

EVIDENCE: *Opinion, belief or inference of a witness - Normally irrelevant or inadmissible.*

The plaintiff who was employed as a welder by the 1st defendant was severely burned in an accident when he was welding the leak of the oil tank of a tank truck belonging to the 2nd defendant. The 1st defendant did not enter a defence and interlocutory judgment was accordingly entered against him. The action against the 2nd defendant was for breach of common law duty and negligence. The breach of common law duty as pleaded by the plaintiff was based on (a) *res ipsa loquitur* (b) the neighbour principle laid down in *Donoghue v. Stevenson* (c) duty owed by occupier to invitee or licensee. The plaintiff claimed that he was doing some welding work in the inside of the tanker when the spot he was welding caught fire and he was severely burned as a result.

The plaintiff alleged that the 2nd defendant was negligent in

(a) Failing to see that the tanker was clear of all oil before sending it for welding

(b) Sending in for welding a tanker which was not properly cleaned of its oil

(c) Failing to inform the first-named defendant of the condition of the tanker in that it required to be cleaned before welding operations begun.

One of the issues before the Court was whether the tanker was used to carry diesel oil or petrol. The 2nd defendant maintained that the said tanker was only used for the purposes of carrying diesel oil.

The plaintiffs' Counsel submitted *inter alia* that they were left in the dark as to how the accident occurred as the plaintiff was not allowed to give his opinion to that effect.

Among other issues raised were whether there was a duty in the circumstances of this case for the owner to clean the tanker in question before sending it for welding and also whether it was the duty of the owner to inform the employer and his servants that the tanker should be cleaned.

Held:

[1] The Court alone and no one else is entitled to an opinion. It is settled, except for some well-known exceptions, that the opinion, belief or inference of a witness is normally irrelevant or inadmissible because it is the function of a Court to form its opinion on the facts given in evidence before it.

[2] On the inference of the facts, the Court found that the tanker in question did not carry any petroleum products on the relevant dates.

[3] The Court also found as a fact that when the plaintiff welded the tanker, it was in a perfectly safe condition and was not in any blameworthy condition.

[4] The Court also found that the owner of the tanker had not been negligent in any way and that the principle of *res ipsa loquitur* does not apply against the owner and the employer.

[5] Since the Court came to the conclusion that the tanker was in a perfectly safe condition, the Court found that the questions raised by the plaintiff as to the duty of the owner to clean the tanker or to inform the employer or his servant that the tanker should be cleaned ought to be answered in the negative.

[Judgment for plaintiff against 1st defendant. Claim against 2nd defendant dismissed with costs.]

Cases referred to:
Donoghue v. Stevenson [1932] All ER 1
Cunnington v. Great Eastern Railways [1883] 49 LT 392

Other sources referred to:
Philson on Evidence, 11th Edn., p. 503, para. 1272
Sarkar on Evidence, 12th Edn. p. 489

For the plaintiff - Americk Sidhu; M/s. Khoo & Sidhu
For the 2nd defendant - S. Kanagasabapathi; M/s. R.K. Nathan & Co.
For the 1st defendant in person

JUDGMENT

Peh Swee Chin J:

Pursuant to leave granted on 29 April 1985 to the plaintiff to appeal to the Supreme Court against my dismissal of the claim against the 2nd defendant, I now give my grounds of judgment.

The plaintiff, who was employed as a welder by the 1st defendant, (hereinafter called the employer), at the time of the accident, was welding the oil tank of a tank-truck belonging to the 2nd defendant, (hereinafter called the owner), when the plaintiff was severely burnt while being so engaged.

While the plaintiff and the owner were represented at the trial, the employer was not, though present in person. The employer had neither filed a defence nor entered even an appearance earlier. The Court asked the plaintiff's Counsel whether he had wished to ask for interlocutory judgment in default against the employer, he indicated he would. Employer was informed of this, and he offered no objection, neither did he ask for an adjournment to engage Counsel. Interlocutory judgment was in consequence entered against the 1st defendant i.e. the employer, in favour of the plaintiff, pending assessment of damages which were subsequently assessed and awarded at the trial as follows:

(a) RM7,020 being pre-trial total losses of earnings at the rate of RM234 per mensem, or $9 per day for 2½ years with interest at 3% per annum from date of accident to date of satisfaction;

(b) RM25,000 for pain and suffering for the injuries, being a sum agreed subject to proof of liability, between both Counsel for plaintiff and 2nd defendant, which the Court adopted as well, as the damages to be awarded against the 1st defendant with interest at 6% per annum from date of service to date of satisfaction;

(c) RM10,000 for loss of future earning capacity which carried no interest.

Some elucidation is necessary for the above figures. The plaintiff was found to be earning more, when he resumed work than before the accident, and therefore no loss of future earnings was awarded, and instead, a sum for loss of future earning capacity, this time, a larger figure, in view of rather serious residual disabilities, to compensate for the loss of that competitive edge in the labour market, taking account of the fact also, that no award was being made for loss of future earnings. Further, the Court considered 2½ years as sufficient time for him both to recover substantially from the injuries and for looking for and securing new employment. The sum for pain and suffering was agreed by both Counsel for plaintiff and 2nd defendant, subject to proof of liability as between them, and such figure was considered fair and adopted for the award made against the 1st defendant, i.e. the employer.

As regards the claim against the owner by the plaintiff, the plaintiff had pleaded first, "breach of common law duty" and secondly negligence, which was particularised as follows:

(a) Failing to see that the tanker was clear of all oil before sending it for welding;

(b) Sending in for welding a tanker which was not properly cleaned of its oil;

(c) Failing to inform the first-named defendant of the condition of the tanker in that it required to be cleaned before welding operations are begun.

The "breach of common law duty" as pleaded by the plaintiff, turned out, as evident from the written submissions of his Counsel, to be based, first on *res ipsa loquitur*, secondly on the negligence as owed to plaintiff in terms of the word "neighbour" from the celebrated passage in Lord Atkin's speech in *Donoghue v. Stevenson* [1932] All ER 1, and thirdly on the basis of duty owed by an occupier to an invitee or licensee, whom the plaintiff was said to be one. I will revert to all these at a later stage.

The plaintiff gave evidence to the effect that on 16 September 1975 the tank-truck in question, (hereinafter called the tanker, and all other tank-trucks also as tankers), was leaking. The plaintiff welded the leak and it was taken back to the owner. He had done similar work on similar tankers before, he said. He did the welding work inside the tank in which there was a leak at the bottom. The following day, i.e. 17 September 1975 the same tanker was sent back to him and said to be still leaking, it turned out later to be at the same spot. Plaintiff was asked to weld it again. He used an electrical welder, which worked in such a way that when it touched any part to be welded, "fire" would come on without the need to use a match. On the second day when he was welding the same leak, (i.e. after it was sent back to him from owner because the owner found the same spot leaking) he said, to quote:

> ... The fire that came on was flame. On that day of accident, when I was in the process of welding, I put the welder on that part, a flame came on. I could not see the flame because I was very excited as the flame came on suddenly because the fire was quite strong. The flame or fire that came on was the same as the usual flame. The electric welder was using electric current. The spot I was welding on was the same spot I welded before.

Either the questions were clumsily put to him by Counsel, or the plaintiff was not answering questions properly, and in that event, no effort was made to remove any confusion in re-examination. For one thing, all in the same breath, the plaintiff had said he could not see the flame because he was very excited, because the flame came on suddenly, yet he said the fire was quite strong. The effect was that, he saw it and then he did not see it. Yet he said at the same time, that the flame or fire that came on was the same as the usual flame. One might ask, that if it was so, how did it all happen then? The plaintiff went on to give evidence

to the effect that tankers that were sent there for welding were at a bit wet, and there was no fire from these tankers prior to 17 September 1975. On 17 September 1975, when welding this particular tanker, something caught fire.

In cross-examination, the plaintiff said that the employer was doing welding jobs, mostly involving tankers. He had a supervisor who advised him what to do and he was there on the day in question. He said the tankers were mostly tankers for diesel oil which could not catch fire. On 16 September 1975, this particular tanker was sent back to the owner at about 3 p.m. It was brought back to him at about 8 a.m. the next morning. The said supervisor was informed first. On that day of the incident, the plaintiff's assistant opened the lid of the tank of the tanker, he pulled the wire for welding over from the factory, went inside the tank to do the welding work. He was inside the tank for about 10 minutes, and had noticed that it was wet inside just like any other tankers. He did not notice anything other than that. He was wearing a mask and an ordinary shirt but his shirt was not burnt though his body burnt. He denied that the fire had started because his shirt caught fire because of the sparks. His supervisor asked him to do the welding.

The owner gave evidence that he had sent his tanker in question for welding to the employer. He had sent this particular tanker and other tankers to the employer. The tankers sent to the employer were for diesel oil and he had not heard of any explosion or fire in connection with them. On 16 September 1975, he sent the tanker to the employer and in the afternoon of the same day, he sent it back to him. He poured water into it to test the leak in the presence of the employer. It was found to be still leaking and it was sent back to the employer's place, apparently on the same day. On 17 September 1975, it was sent back to the owner (for the second time). There was no sign of explosion or burning, neither was he informed that the plaintiff was burnt. He said he had six other tankers and they were used for diesel oil. This particular tanker was used for this particular purpose. He had a contract with Esso to carry diesel oil. He did not use the tanker in question on 16 September 1975 to carry petrol.

In cross-examination, he said every time a tanker came back from the welding shop, he checked it with water. Sometimes his workers would check it. The employer sometimes sent back the tanker himself and he would check it together with him. Water would be poured into the tank from a pipe through a plastic hose, and in turn through a hole on top of the tank. The tank was more than half filled. He said his checking with water would take about two hours. He saw the employer drive away that tanker at about 6 p.m. (i.e. on 16 September 1975). He had found no burn marks. He personally checked that tanker. He did not go inside as he could see the inside through the hole. The reason for looking in through the hole was because he had to open the hole in order to pour water into it. He looked inside to see whether it was dirty inside after the welding as cleanliness was very important and he did not want to have foreign matters inside. The tanker was divided into watertight compartments. He used different tankers to carry different oils. All his tankers only carried diesel oil. All along, he had carried diesel oil before and after the accident. The first time he knew about the plaintiff being burnt was when he was served with the summons herein. On 16 September 1975, this particular tanker was not carrying any diesel oil because it was sent to employer's workshop. The time for on-loading diesel oil from Esso at Port Dickson was between 8 a.m. and 5. p.m. Esso would carry their petrol through their own lorries. He denied Esso had asked him to carry petrol, kerosene, and aviation fuel besides diesel oil. He denied that before sending it for welding, it had carried petrol. He agreed he did not ask the employer to clean this tanker and he said the employer should know what to do.

In re-examination, he said that since 1975 he had been carrying diesel oil. He had always sent his tankers to the employer's place and he had no reason to tell them how to do their job.

PW5, an executive of the Esso, produced contract dated 26 January 1974 (P3) and contract dated 3 August 1984 (P4) both made with the owner for hiring the latter's tankers. The owner, he said, was supposed to deliver the whole (range) of multiple petroleum products, but he delivered mainly diesel oil, aviation fuel and also LPG, (liquified petroleum gas). He produced invoices around the period of 17 September 1975 (P5A to D). Between 15 September 1975 to 19 July 1975, the owner carried diesel oil of two types, industrial and automobile, kerosene, and a small quantity of petrol. These products were carried by motor lorry NE2503, the tanker in question.

In cross-examination, he agreed that the owner carried mainly diesel oil. P5A related to 15 September 1975 when diesel oil was loaded on to the tanker in question. Yes, he said P5B also related to 15 September 1975. P5C related to 19 September 1975. P5D related to 19 September 1975 also. He agreed that petroleum products were carried on those two days only, (i.e. 15 September 1975 and 19 September 1975). If a compartment of the oil tanker was emptied, the presence of vapour would depend on the type of the product carried. In the case of petrol, the vapour would be very volatile. It could be ignited by burning temperature and if one compartment caught fire it could spread to the next compartment. There could be no explosion.

Before making my findings of fact on the evidence and considering the question of liability in the light of them as against the owner, it would be necessary to refer to p. 4 of the written submissions of learned Counsel for the plaintiff, where he submitted, to quote:

> When the plaintiff was asked for his opinion on how the accident could have occurred, an objection was raised by learned Counsel for the defence which said objection was sustained by Your Lordship. We are therefore left in the dark as to the possibilities that may have given rise to the accident.

The notes of evidence taken down by the Court do not reveal the aforesaid episode. The Court will take Counsel's word for it that it did happen. Before considering the matter further, it is to be borne in mind that the plaintiff was allowed in fact to say how the accident happened, as will be seen from the notes of evidence, i.e. he was allowed to say what he saw, did, and heard while inside the tank but such evidence on its face would not reveal the actual cause of the accident, or to quote Counsel's words, *viz.* "We are therefore left in the dark as to the possibilities that may have given rise to the accident." The Court can infer, that a ruling had been made in the course of the trial at that stage in disallowing the asking of a certain opinion question, and Counsel had once again questioned its correctness in the same Court after such ruling was made.

To ask the plaintiff as to the possibilities that may have given rise to the accident, would be in my view, soliciting for an opinion. This Court alone, and nobody else would be entitled to come to such opinion, and any witness would merely have to say what he saw, heard, did, smell or felt. I do not think this general rule should have been departed from in this case for having fallen within one of its exceptions.

It is settled, except for some well-known exceptions, that the opinion, belief or inference of a witness is normally irrelevant or inadmissible, because it is the function of a court to form its opinion on the facts given in evidence before it. Thus, at p. 503 (or para. 1272) of *Phipson on Evidence*, 11th Edn., while touching on the grounds for such irrelevance, it states:

> The grounds more commonly assigned for its rejection are that opinions, insofar as they may be founded on no evidence or illegal evidence are worthless less and, insofar as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to know conclusions of law or facts ...

The rule normally applies to all witness, be they plaintiffs, defendants or accused persons but like a great many other rules, it has its own exceptions.

The first group of exceptions is as regards opinions of general reputation such as those about public right, pedigree, marriage or identification of persons. The second group of exceptions relates to opinions of experts whose competency can only be acquired by a special course of study or experience such as chemist, doctor and engineer. This is easily appreciated.

There is the third group of exceptions dealing with opinions of non-experts and also opinions not being opinions of general reputation. Such opinions are allowed on very distinct grounds, though of considerable subtlety or refinement. Such opinions usually relate to impressions, which from their nature, either tend to disappear very quickly or are too complicated to be described, (vide *Sarkar on Evidence*, 12th Edn., p. 489 et seq.), and for these reasons, in my view, their potential inaccuracy is tolerated in Court. If a person showed a facial expression indicating anger or disappointment, a witness will be allowed to give an opinion that person was angry or disappointed. For a witness to describe such anger, such descriptions would often make very little sense in Court. In other words, such an opinion cannot be described in a language which will enable other persons, not being such eye-witnesses, to form an accurate judgment in regard to them. There are of course numerous examples of such impressions or opinions such as matters or conclusions of colours, weight, brightness, darkness, the state of the weather, the state of feelings between persons, the appearance of individuals, distance, quantity, fear, anger, size, time, state of good health. etc.

These conclusions or opinions of the kinds exemplified above are not exhaustive. There is one very important attribute as to such opinions or conclusions to be borne in mind. All such conclusions are based on what a witness has seen, or observed and heard, but not speculations based on hypothesis.

To ask a witness "as to the possibilities that may have given rise to the accident", would appear to ask a pure hypothetical question or an opinion question not coming within the well-known exceptions above. Apart from anything else, Counsel ought not to have persisted in his submission by questioning the correctness of the ruling of disallowing such question before the same trial Court at a later stage. This act, bordering on discourtesy, would not however deter this Court from discharging its duty fairly, I must hasten to add.

I turn once more to the facts, on which, I had made my findings. I accepted the evidence of PW5, that as far as Esso and the owner were concerned, that only on two days, viz., 15 September 1975 and 19 September 1975, (not from 15 September 1975 to 19 September 1975), the tanker in question carried diesel oil of two kinds, *viz.*, both industrial and automobile, also kerosene and a small quantity of petrol. I accepted the invoices PW5 produced, i.e. P5A to P5D which showed very clearly that petroleum products, not consisting solely of diesel oil, were carried only on those two days. PW5 was called by plaintiff. It is very pertinent to point out that plaintiff was injured in a fire inside the tank of the tanker in question on 17 September 1975 and that it would be most crucial, from the case that the plaintiff had sought to make out, by speaking of something catching fire, that the tanker in question had in fact carried inflammable or highly inflammable or volatile petroleum product (other than diesel oil) on 16 & 17 September 1975, in particular, between the time the tanker

was returned by plaintiff's employer on 16 September 1975 after the first or initial repair work on it AND up to the time when the plaintiff was re-welding the same leakage on 17 September 1975 when he was injured in a fire inside the tank. Plaintiff's most critical witness failed to produce any invoices to show that the tanker in question, in fact, did carry at all, any petroleum product, whether inflammable or not on 16 September 1975, or even in the early morning on 17 September 1975 (before the plaintiff re-welded the tanker on that fateful morning). No explanation was proferred for such failure. There could only be one reasonable inference in the circumstances for such failure i.e. that there were no such invoices.

Further, the fact that the tanker did carry inflammable petroleum products other than diesel oil on 15 September 1975 had no bearing, or material or consequential effect on the question of liability in this case because, after such carriage of such inflammable products, the tanker was in a perfectly safe condition when it was sent to the employer or plaintiff on 16 September 1975 for the first occasion of the repair of the leakage. On this first occasion, nothing happened to cause any injury at all or even to arouse the slightest suspicion on the part of the plaintiff and his supervisor that there could be any cause for concern inside the tank. On a balance of probabilities, I found as a fact that the tanker, when it was first sent to the plaintiff for welding, was in a perfectly safe condition and not in any blameworthy condition. There was never any suggestion and I think rightly so, that the tanker in question had carried inflammable product on 16 September 1975 from other rival oil company of "Esso" such as "Shell", for to do so would probably jeopardise their haulage contract or relationship with Esso whose custom and ample financial ability to pay haulage bills could not have been lost on the mind of the owner.

I therefore found as a fact that on those two most crucial days, i.e. 16 September 1975 and 17 September 1975, the tanker in question, did not carry any petroleum product of any kind at all, and I found further that the tanker was in a perfectly safe condition when the plaintiff for the first time did welding work on it and that such perfectly safe condition had continued when the plaintiff for the second time did welding work on it and when the plaintiff was injured in a fire. Though not essential to say so, the fault of the employer, and supervisor and faulty welding equipments cannot be ruled out.

In his submission, learned Counsel for the plaintiff submitted on the maxim of *res ipsa loquitur* in relation to "common law duty of care". This common law duty of care, according to him, was based first on the principle adopted in *Donoghue v. Stevenson* (*supra*), and similar cases secondly, on the owner as occupier owing a duty of care to the plaintiff, an invitee or licensee.

The accuracy of the *ratio decidendi* in *Donoghue* case can never be in doubt, and it has been applied in numerous cases in all common law jurisdictions since 1932. The plaintiff was placed in such a position vis a vis the owner in repairing the owner's tanker, that owner was bound not to do anything to cause danger of injury to the plaintiff or to exercise care to prevent such danger quite irrespective of any absence of any contractual relations as in *Donoghue* case, though contractual relationship did exist in the instant case. The *Donoghue* case was truly remarkable for the absence of contractual relationship between the consumer/ plaintiff and the manufacturer of that historic ginger beer bottle containing that dead snail.

I was of the view that the circumstances in this case showed that there was a fire in which the plaintiff was injured, and that the fire could not be the usual flame that came when welding operation started, as mentioned in fact by the plaintiff, but some unusual fire in which the plaintiff was injured. The owner had management of the tanker before it was sent to the

plaintiff for welding and the employer had management of the whole workshop including all the equipments and control system of such equipments used for welding purposes and the fire that caused the injuries would not have occurred; but for negligence of either the employer and/or the owner; in the absence of any appropriate explanation, I held the rule of *res ipsa loquitur* applied against both the employer and the owner.

On such presumption of negligence because *res ipsa loquitur*, I held that the owner had shown to my satisfaction that the owner had not been negligent in any way in regard to the tanker when it was sent to the plaintiff, especially during the second time it was sent to the plaintiff for a second round of repair of the same leakage so that, in my view the balance that tilted against the owner because of *res ipsa loquitur*, had been redressed, in view of my findings on the evidence as set out above.

I deal next with the negligence which the plaintiff had pleaded with particulars appended thereto. These particulars of negligence, pleaded apparently in addition to, and separately from the common law duty of care based on the liability, of an occupier owed to an invitee or a licensee, or that adopted in *Donoghue* case, would appear from the nature of such particulars, to be inseparably bound with one another, so I would deal with them together unless it would be necessary to treat any particular matter on a separate basis for the sake of clarity.

The questions posed by the matters pleaded above were whether there was a duty in the circumstances of this case for the owner to clean the tanker in question before sending it for welding and also whether it was the duty of the owner to inform the employer and his servants that the tanker should be cleaned.

I had found earlier that the tanker did not carry any petroleum product on these two crucial days, and that it was in a perfectly safe condition when the tanker was first sent to the plaintiff on 16 September 1975 until the fire, these findings should, in my view, provide a complete and negative answer to these two questions. If these were not enough to conclude the matter, let's pursue the matter even further.

Let me focus, for a change, on the plaintiff to illuminate more corners, if only to put to the litmus test, the conclusion reached in the preceding paragraph. The plaintiff knew only too well that the tanker was sent to him for welding. The plaintiff, his supervisor, and his employer all had, at their disposal readily, the means of knowledge as to the presence of any residue of any petroleum product more inflammable than diesel oil. Such means could be exercised by plaintiff, *inter alia*, by looking, smelling or otherwise investigating the state of things in regard to this particular tanker. In other words, the residue of any inflammable petroleum product would have been so very apparent to the plaintiff and could not have been missed or over-looked at all by the plaintiff. To ignore what cannot be ignored will be just like walking forward beyond the top of a precipice. There was the case of *Cunnington v. Great Northern Railway* [1883] 49 LT 392, in which it was held that there was no duty of care owed to recipients of empty casks which had been earlier filled with volatile turpentine oil. The defendants knew that the empty casks were to be used for filling with ketchup but they did not know they would be so used without previous examination by the recipients. The defendants were held not liable.

Again on the basis of the plaintiff being an invitee, more specifically, the duty to an invitee being to take reasonable care to prevent injury from unusual danger to the plaintiff of which the owner knew or ought to have known, there was, in fact, no unusual danger at all in view of my aforesaid factual findings which would equally apply, *a fortiori*, to the submission

that the plaintiff was a licensee, the duty owed to a licensee being lighter, such duty being merely to warn the plaintiff of trap or concealed danger, all such submissions tended to be that proverbial pound of law which is said to equal only to one ounce of fact.

I therefore dismissed the claim against the owner with costs. On the question of costs, during the time judgment in this case was being reserved before its delivery the Court had already considered the feasibility of making a Bullock order or Sanderson order but then had exercised its discretion not to make one but to let costs follow the event. First of all, to all intents and purposes, both the employer (1st defendant) and the owner (2nd defendant) had not blamed each other. Secondly, looking at the facts, in view of the evidence of PW5, of which the plaintiff must have been prescient, the claim against the owner would be doomed to failure and for the same reason, the plaintiff could not be heard to say to be in doubt as to whom it was proper to sue. Thirdly the claim against both defendants would appear to be based on two distinct sets of facts. Fourthly to make such a Bullock order or Sanderson order would have the effect of penalising the 1st defendant who had practically submitted to judgment.

Also found at [1986] 2 CLJ 76